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No.01-_____

In The
Supreme Court of the United States

BENITA SHVAUGHN HARRIS
Petitioner,

v.

COCA-COLA BOTTLING CO. CONSOLIDATED
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Fourth Circuit's opinion below decided a federal question in a way that directly and plainly conflicts with the Supreme Court precedent set forth in *Reeves v. Sanderson Plumbing Co.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000)?

PARTIES

All parties appear in the caption on the cover page. Petitioner, Shvaughn Harris, was employed formerly by Respondent, Coca-Cola Bottling Company Consolidated.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, whose mandate was entered in this proceeding August 16, 2001.

OPINIONS BELOW

The opinions of the court of appeals and the district court are unreported. Both opinions are reprinted herein in the Appendix.

JURISDICTION

Jurisdiction of this Court to review the decision of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C.§ 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 2000e-3 provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation proceeding, or hearing under this subchatper.

STATEMENT

The Complaint of Benita Shvaughn Harris (herein after "Petitioner") challenged various actions by Respondent that deprived her of rights secured to her by Title VII of the

Civil Rights Act of 1964, as amended and 42 U.S.C. § 1981. After the district court granted the Respondent's motion for summary judgment, Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit Court of Appeals affirmed the judgment of the district court. The facts sets forth herein are taken from the joint appendix filed with the court of appeals.[1]

A. FACTS

Petitioner, an African-American woman, was discharged from her employment with Coca-Cola Bottling Company Consolidated (hereinafter "the Company") one day after she complained to the Company president about racially offensive conduct in the workplace. Prior to the events leading up to her termination, Petitioner had enjoyed consistently outstanding performance evaluations and promotions. (J. App. 433-43.)

In July 1996, the National Association for the Advancement of Colored People (NAACP) held its annual national convention in Charlotte, North Carolina, where it sponsored a job fair. At that time, Petitioner's primary responsibility was providing administrative and clerical support to then-Regional Manager Dave Brown, a white man, and Bob Pettus, also white, the Company's then-Vice President for Human Resources. (J.App. 28.) The Company requested Petitioner, among other employees, to represent it at one of the job fair's placement booths. (J. App. 83-85.)

The Sunday before the job fair, the Company ran an advertisement in *The Charlotte Observer* for the position of sales manager trainee. (J. App. 232.) Petitioner saw the ad and became concerned that it would cause a problem for the

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[1] Record references are as follows: the appendix to the petition is indicated as (App A or B. ___); and the Joint Appendix below is indicated as (J. App. ___).

Company because she believed that the parentheticals in the ad were offensive and degrading to African-Americans.[2] (J. App. 86-93, 100.) Other Coca-Cola ads contained no such parentheticals. (J. App. 340-59.) Petitioner discussed this with her husband and some friends, who agreed that the ad was insulting to African-Americans.

Petitioner met with Brown the following morning to express her dismay over the ad's implications. (J. App. 90.) Brown told her that his wife had also expressed concern over the content of the ad. (J. App. 90, 384.) During the next few days of the job fair, Petitioner discussed the ad with three or four colleagues. Brown also requested that she photocopy the ad so he could discuss it with Steve Hewitt, the Manager of Organizational Development and author of the ad. (J. App. 94-95.)

The following Monday, July 15, Brown summoned Petitioner to his office and informed her that he had received reports from staff that she was unapproachable and uncooperative. (J. App. 106-07.) This was the first time in her three years with the Company that Brown had criticized her. In fact, Brown has described Petitioner in a performance evaluation as a "team player." (J. App. 434.) Brown also told her that Hewitt was concerned about her soliciting employee opinions about whether the ad was

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[2] The ad read in pertinent part:

Opportunity Has Never Tasted Better

Sales Manager Trainees Coca-Cola Bottling Company Consolidated will be recruiting at the NAACP Job Fair for Sales Management Trainees. The successful candidates will have a Bachelor's degree and a minimum of 6-12 months sales or management experience. In addition, successful applicants will possesses excellent communication skills (i.e. listens attentively, uses proper grammar, gets point across, etc.), leadership traits (i.e. sets a good example, demonstrates initiative, maintains self-control under pressure) and a high degree of integrity, among other skills and abilities.

(App. B 27a.)

offensive to African-Americans. He told Petitioner that if she had time to "solicit" comments and poll employees about the ad, she obviously did not have enough work to do. (J. App. 168.)

The next day, he reprimanded Petitioner in writing for: (1) soliciting comments about the NAACP ad; (2) questioning a manager; and (3) not properly utilizing her time. He also told her that he was scheduling a team building session for all his employees. (J. App. 107.)

On July 22, 1996, Brown officially gave Petitioner the written reprimand he had informed her about the previous week. While stressing that it was not a corrective action, he specifically admonished her to discuss neither non-business related subjects nor the ad at work. For the first time, he also said that her work performance was not up to par. (J. App. 433-443.)

On August 5, Petitioner sent a reply memo to Brown that she copied to Pettus, the Company's Regional Vice-President. In it, she expressed displeasure that her efforts to alert the company to the concerns of African-Americans had been so terribly misconstrued. (J. App. 235.) She also questioned whether the Company's response to her concerns was retaliatory in nature.

Approximately three weeks later, on August 13, Brown again called Petitioner in to a conference, this time to express his contempt for the fact that she had copied her memo to Pettus. Petitioner was puzzled given the Company's explicit "open door" policy, which encourages any and all employees to discuss their concerns with any level of management. (J. App. 204-205.)

As these events unfolded, Petitioner began to suffer considerable anxiety because the terms and conditions of her work were starting to change for the worse. For example, although other administrative assistants routinely had access to the computer system, Petitioner's access was taken away.

After she complained it was only partially returned to her two months later. (J.App. 188.)

On August 26, 1996, she took her concerns to Bobbie Fritzen, the Company's Regional Human Resource Manager. (J. App. 128, 130.) Fritzen suggested a meeting to resolve some of the issues distressing Petitioner. At Fritzen's suggestion, Brown, Hewitt, and Petitioner met to discuss the problem. During the meeting, Hewitt lost his temper and told Petitioner that he had "gone against Jim Moore and the Norm Georges of the company to hire minorities." (J. App. 136.) These assertions about upper management's attitude toward people of color caused Petitioner to fear for her "promotablility" in the Company. (J. App. 136.)

September 6, 1996, Pettus informed Petitioner and Hewitt that all issues pertaining to the ad would be removed from their personnel files and destroyed if they agreed to put the incident behind them. (J. App. 177.) Petitioner agreed to do so if Hewitt would apologize. He refused.

At a follow-up meeting, Petitioner met with Pettus again to express concern about perceived racism in the Company, and her fear that she was being retaliated against for speaking up about the Company's need to be more sensitive to African-American employees. (J. App. 177.) She voiced her belief that she was professionally vulnerable because it appeared that minorities were not welcomed by upper management, and her suspicion that this was why she had been denied specific advancement opportunities in the past. She relayed to Pettus a number of illustrative anecdotes, including:

1. A supervisor in the mail room who talked about her cat named "nigger,"
2. Employees who remarked there were "too many niggers in the mail room," and;
3. Some employees who felt "customers just didn't want to deal/talk with niggers."

(J. App. 188, 191.)

Over a month later, Pettus summarized the meeting in a memo and asked her to identify specific phrases and actions that might be deemed racially offensive. (J. App. 147.) Although she responded on Oct. 29, 1996, (J. App. 224-25.) no other corrective efforts, including the promised team building sessions, were made by the company.

On November 13, Brown told Petitioner that he and Pettus had come up with some options for her: (1) stay in her current position and get part-time help with her clerical duties; (2) move to a field position in the Southern Division, provided one was available; (3) consider a position selling vending machines or fountains; or (4) transition out of the company, with company funded outplacement services and severance pay. (J. App. 151-153.) Mr. Brown also informed Petitioner that Mr. Hewitt was going to be promoted to another position. (J. App. 151.)

The next day, Petitioner sent an e-mail to Company President Jim Moore, with copies to Division Vice President Norm George, Chairman of the Board Frank Harrison III, Pettus, Fritzen, and Brown. (J. App. 237.) The e-mail read as follows:

> Mr. Moore: Dave Brown informed me yesterday that Steve Hewitt is being promoted to director. I'm outraged that CCBCC has seen fit to promote Steve. This is a man, who told me in a meeting with Dave Brown, that you and the "Norm George's of this Company did not want minorities here." He also told me that one of us did not need to be here and that he had a wife and family and that he needed his job and demanded that Dave Brown fire me because I brought to the Company's attention a job advertisement Steve placed in the Observer that African Americans considered insensitive and degrading. I had also informed Bobbie Fritzen and Bob Pettus of this matter and I cannot believe that

CCBCC would reward such outrageous behavior with a promotion.
Respectfully, Shvaughn Harris

On November 15, 1996, Brown fired Petitioner because, he said, she had refused to put the incidents surrounding the publication of the ad behind her and he could no longer trust her. (J.App.160-61.) The offered assurance of pay and out placement services were no longer available to her.

B. PROCEDINGS BELOW

Petitioner filed suit against Coca-Cola Bottling Company Consolidated seeking relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et. seq.*, the Civil Rights Act of 1866, 42 U.S.C. § 1981, the Civil Rights Act of 1991, 42 U.S.C. § 1981a, and the common law of North Carolina. At the trial court level, Petitioner asserted claims for race discrimination in termination, race discrimination in discipline, hostile work environment, retaliatory hostile work environment, and retaliatory discharge. The United States District Court for the Western District of North Carolina, Charlotte Division, Judge Mullen presiding, held that there were no genuine issues of material fact and granted judgment to Respondent on all of Petitioner's claims as a matter of law. (AppB. 30a.) In making each of its determinations, the lower court credited Respondent's version of events over that of Petitioner and applied a higher standard of proof than is currently required under the law.

On appeal to the Fourth Circuit Court of Appeals, Petitioner maintained only her claims for retaliatory hostile work environment and retaliatory discharge. (AppA. 2a.) On August 16, 2001, the court of appeals affirmed the judgment of the trial court and incorporated its reasoning by express reference. (AppA. 5a.)

Petitioner prays that this Court issue the writ of certiorari because the court of appeals patently ignored Supreme Court precedent in adopting the decision of the trial court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Fourth Circuit's decision to affirm the district court's grant of summary judgment in favor of Respondent and to adopt the lower court's reasoning is plainly in contravention of this Court's decision in *Reeves v. Sanderson Plumbing*, 530 U.S., 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000). *See e.g., Colorado v. Connelly*, 474 U.S. 1050, 106 S. Ct. 785, 88 L.Ed.2d 763 (1986) (granting certiorari where the lower court decision was in conflict with prior holdings of the Court).[3]

I. *Reeves* eliminated the "Pretext-Plus" Standard of Proof for Summary Judgment in Discrimination Cases.

The inferential proof doctrine for Title VII cases crafted in *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981), attempts to address the reality that discrimination is not always overt and cannot always be proved by direct evidence of discriminatory intent.[4] As this Court has noted, "[t]here will seldom be 'eyewitness' testimony as to the employer's mental process."

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[3] Supreme Court Rule 10.1(c) instructs that a petition for writ of certiorari may be granted "when . . . a United States court of appeals has decided an important question of federal law . . . in a way in conflict with applicable decisions of this Court."

[4] *See* McGinley, Ann C., *¡Viva La Evolucion!: Recognizing Unconscious Motive In Title VII*, 9 Cornell J.L. & Pub. Pol'y 415 (2000).

U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716, 103 S. Ct. 1478, 1482, 75 L.Ed.2d 403 (1983).

Circuits utilizing the *McDonnell Douglas/Burdine* burden-shifting framework have not always been consistent in applying it. In response to this confusion, this Court, in *St. Mary's Honor Center v. Hicks*, attempted to settle the "divergent views" as to whether a factfinder's rejection of an employer's asserted legitimate nondiscriminatory reason mandates a finding for the plaintiff. *See Hicks*, 509 U.S. 502, 512, 113 S. Ct. 2742, 2751, 125 L.Ed.2d 407 (1993). This Court held that "the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by mendacity) may together with the elements of the prima facie case, suffice to show discrimination." *Id.* at 511. Justice Scalia, writing for the majority, further noted, "[n]othing in the law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action not believable." *Id.* at 514.

Hicks did little to settle the question of whether a Title VII plaintiff must proffer additional evidence of intentional discrimination beyond her *prima facie* case when the employer's legitimate, nondiscriminatory reason is disbelieved. Circuits imposing a "pretext-plus" standard for summary judgment relied on *Hicks* to support their higher burden of proof. At the same time, circuits imposing "pretext only" standards also relied on *Hicks* for their support. *Compare*, *Vaughn v. MetraHealth Co. Inc.*, 145 F.3d 197 (4th Cir. 1998) (stating *Hicks* "teaches that to survive a motion for summary judgment . . . the plaintiff must do more than raise a jury question about the veracity of the employer's proffered justification"), with *Waldron v. SL Indus., Inc.*, 56 F.3d 491 (3rd Cir. 1995) (relying on *Hicks* for the proposition that disbelief of the employer's legitimate

nondiscriminatory reason, combined with a *prima facie* case, suffices to show intentional discrimination)).

In light of the continued confusion among the courts of appeals, this Court granted *certiorari* in *Reeves* to determine conclusively whether a plaintiff's *prima facie* case of discrimination combined with sufficient evidence of pretext is adequate to sustain a finding of liability for intentional discrimination. *See Reeves,* 530 U.S. at 140. In answer to this question, this Court held that the trier of fact may infer the ultimate fact of discrimination from the falsity of the employer's explanation, combined with the plaintiff's *prima facie* case. *See id.* at 147.[5]

Reeves establishes the quantum of proof required to survive a defendant's motion for summary judgment in inferential discrimination cases.[6] This Court reiterated the familiar maxim that, when reviewing a motion for summary judgment in a circumstantial discrimination case, the court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh evidence." *Id.* at 150. Justice O'Connor further admonished that credibility determinations and weighing evidence are "jury functions, not those of a judge." *Ibid.* The Court instructed lower courts to "disregard all evidence favorable to the moving party that the jury is not

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[5] Justice O'Connor, writing for the unanimous Court, went on to note that such a showing will not always be sufficient to support a finding of liability. *See id.* at 148. "Certainly there will be instances where no rational factfinder could conclude that the action was discriminatory." *Ibid.* By way of example, the Justice notes that a defendant would be entitled to judgment as a matter of law if its offered reasons were a pretext for a different nondiscriminatory reason. *See ibid.*

[6] *Reeves* was decided in the context of a Rule 50 motion for judgment as a matter of law; however, the "standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Id.* at 150 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)).

required to believe." *Id.* at 151. That is, district courts must give credence "to the evidence favoring the nonmovant." *Ibid.*

Reeves holds that a trial court should deny defendant's motion for summary judgment when a plaintiff provides evidence of her *prima facie* case, and evidence that a reasonable jury is entitled to believe illustrating that the employer's nondiscriminatory reason was pretextual. *Reeves* admonishes further that lower courts should leave the business of drawing inferences and making credibility determinations to the jury.

II. The Decision of the Court of Appeals is Clearly Erroneous, and Conflicts With This Court's Precedent in *Reeves*.

In upholding the lower court's dismissal of this action, the Fourth Circuit neglected to apply either of the *Reeves* directives, both by failing to draw reasonable inferences in favor of Petitioner, and by utilizing the pre-*Reeves* pretext-plus standard for overcoming summary judgment in a *McDonnell Douglas* case.[7] The decision of the Fourth Circuit Court of Appeals explicitly incorporated the logic and reasoning of the district court without undertaking an independent legal analysis of its own.[8] Because the lower court applied an incorrect formulation of both the *McDonnell Douglas* framework and the summary judgment standard in general, the Fourth Circuit erred either in failing to remand the case for review in accordance with *Reeves*, or failing to reverse the lower court on the merits.

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[7] The court of appeals stated, "we conclude that the district court correctly decided the issues before it. Accordingly, we affirm substantially on the reasoning of the district court." (AppA. 5a.)

[8] The August 16, 2001 court of appeals decision is sufficiently subsequent to *Reeves'* June 12, 2000 date of decision to assume the court of appeals was aware of it.

A. The Trial Court Erred In Concluding That Petitioner Did Not Establish a *Prima Facie* Case of Retaliation.

First, in contravention of *Reeves* and basic principles of summary judgment law, the district court failed to view the facts in the light most favorable to Petitioner and refrain from making credibility determinations. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986). The lower court overstepped its bounds and invaded the territory of the factfinder in two ways: (1) by viewing Petitioner's conduct in a vacuum, ignoring some activity altogether, and unreasonably characterizing it as unprotected by Title VII, and (2) by accepting the Defendant's asserted nondiscriminatory reasons as true when there was evidence to the contrary.

The trial court below categorically determined that Petitioner's activities were not protected opposition activities.[9] (AppB. 26a-28a.) The district court decided that Petitioner had not engaged in opposition activity because her opposition to the *Observer Ad* was not unlawful under Title VII. (App.B 28a.) The trial court, however, failed to note, let alone consider, Petitioner's additional complaints of: (1) racial epithets being used in the work place, (2) statements that upper level management was opposed to promoting

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[9] Under Title VII, it is unlawful "for an employer to discriminate against any of his employees ... because [the employee] has opposed any practice made an unlawful employment practice by [by Title VII] or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." *See* 42 U.S.C. §2000e-3(a).

minorities, (3) a lack of sensitivity to the needs of African-American employees, and (4) fear of reprisal for voicing these concerns. When these additional complaints are viewed along side Petitioner's opposition to the ad, it becomes clear that Petitioner was opposing what she reasonably believed to be a racially hostile work environment.[10] *See Demby v. Preston Trucking Co., Inc.*, 961 F. Supp. 863 (D. Md. 1997) (holding that an employee established *prima facie* case of hostile work environment where the employee recounted several incidents having racial animus at their core, including use of the word "nigger" by fellow employees, and an inadequate response by employer). Thus, while the trial court stated that Petitioner had only to demonstrate a reasonably objective belief that the opposed activity was unlawful, it failed to consider the totality of the circumstances that could reasonably give rise to such a belief. *See Bigge v. Albertsons, Inc.*, 894 F.2d 1497, 1503 (11th Cir. 1990).[11]

Further, the concerns Petitioner raised about the ad, coworkers' use of racially offensive language, statements of racial animus from Company officials toward hiring African Americans, and her "promotability," resulted finally in her termination. Thus, Petitioner was unlawfully discharged in retaliation for opposing conduct that she reasonably believed violated Title VII.

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[10] A racially hostile environment claim requires that the plaintiff show that her work environment was so pervaded by racial harassment as to alter the terms and conditions of her employment. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998).

[11] It should be noted, though, that it is far from clear that this is the correct standard. This Court, in *Clark County School Dist. v. Breeden*, specifically refused to decide whether an objectively reasonable, good faith belief that an incident constituted unlawful harassment is required as a part of the *prima facie* case of retaliation. *See* 532 U.S. 268, 121 S. Ct. 1508, 149 L.Ed.2d 509 (2001).

The lower court erred in not finding that Petitioner established a *prima facie* case of retaliatory discharge and harassment, by refusing to draw all reasonable inferences in favor of Petitioner and consider the totality of the events giving rise to her reasonable belief that she was being subjected to a racially hostile work environment.

B. The Court Erred in Applying the Pre-*Reeves* Pretext-Plus Standard of Review.

Moving forward to the next phase of the *McDonnell Douglas* framework, the trial court also erred by accepting the Company's nondiscriminatory reasons for retaliatory harassment and retaliatory discharge where there was contradictory evidence in the record sufficient to support a finding of pretext. The Company put forth three nondiscriminatory reasons for its decision: (1) Petitioner refused to put her differences with Hewitt behind her, (2) Brown lost his trust in Petitioner because she went directly to Moore, Harrison, and George with her opinions about Hewitt's promotion instead of coming to him first, and (3) Brown believed that the contents of her e-mail message were inaccurate and misleading. (AppB. 18a .) The district court incorrectly stated, "Plaintiff has no evidence that would create a disputed issue as to the legitimacy of Brown's reasons for terminating her." (AppB. 21a.)

To the contrary, the record indicates that Petitioner put forward sufficient evidence for a reasonable jury to find the Company's reasons were pretextual. First, the Court fails to note that Petitioner had a pristine work record prior to her initial complaint. Criticisms of her trustworthiness did not arise until immediately after she challenged the Company's commitment to its African American employees and to diversity in the workplace. As to Petitioner's alleged failure to put the Hewitt incident behind her, a jury would be

entitled to believe that the Company was more interested in stifling Petitioner than in her relationship with Hewitt. Surely the law does not limit an employee to one protest about discriminatory behavior and require her to remain silent if corrective action is not taken. The purpose of Title VII, to eliminate unlawful workplace discrimination, is circumvented if employees are limited to one complaint even in the face of retaliation. A jury could reasonably believe that Brown fired Petitioner because she protested a pattern of racism and utilized the Company's procedures for appealing decisions she believed to be unsatisfactory.

Brown's claim that he did not trust Petitioner could also be reasonably seen as pretext, given the express open door policy of the Company. It would not be a hard leap for a jury to doubt that Brown would terminate Petitioner for doing precisely what the Company policy manual encourages.

As to the the memo to George, the trial court repeatedly characterized it as a mere protest of Hewitt's promotion, where an equally reasonable interpretation of the memo would be to see it as another complaint about racial animus in the Company. The memo does not address only the promotion. Rather, it draws the president's attention to the insensitive ad and to Petitioner's concerns that he did not want minorities in the company. This e-mail could, thus, be aptly characterized as opposition speech, not mere disdain for Hewitt's promotion. A jury could clearly draw a conclusion of pretext from these factual inconsistencies.

It is apparent that the district court, and thus the Fourth Circuit, failed to "disregard all evidence favorable to the moving party that the jury is not required to believe . . . [and failed to] give credence to the evidence favoring the nonmovant." *Reeves*, 530 U.S. at 150-51. As this Court has admonished, "trial courts should act ... with caution in granting summary judgment [and should] deny summary judgment in a case where there is reason to believe that the

better course would be to proceed to a full trial." *Anderson*, 477 U.S. at 255. The district court below did not exercise caution. Rather, it chose to believe the Company when it was not permitted to do so. In so doing, it ignored this Court's precedent and plainly usurped the role of the jury.

More importantly, the district court's opinion is replete with pretext-plus language. From the outset the trial court operated under the incorrect standard stating, "the Plaintiff must come forward with evidence establishing that the Defendant's reasons are a pretext and that Defendant was, in fact, unlawfully motivated by the Plaintiff's race." (App.B 38a (emphasis added).) This is the very language Justice O'Connor deemed to be incorrect in *Reeves*. *See Reeves*, 530 U.S. at 146. The trial court further stated that Petitioner had failed to create an inference of discrimination because she failed to put forth affirmative evidence that "the real reason [for her termination] was race discrimination." (App.B 40a.) This language plainly indicates the lower court was applying the pretext-plus standard: requiring Petitioner to provide evidence of bad motive beyond the *prima facie* case to survive summary judgment. The Fourth Circuit ignored this Court's decision in *Reeves* by failing to, at least, remand this case for consideration in light of that decision.

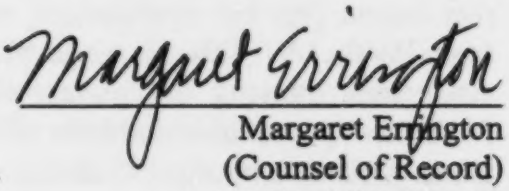
Given that the trial court erred both in finding that Petitioner did not engage in protected activity and in crediting the Company's nondiscriminatory reason, it becomes apparent that summary judgment was improperly granted. Petitioner has put forth evidence that she reasonably believed she was opposing unlawful acts. The record demonstrates evidence of retaliation, for example, in Petitioner's loss of computer access, being written up for bringing the ad to management's attention, and finally, being terminated. *See Von Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001) (holding that an adverse employment action sufficient to support a Title VII retaliation claim includes any

retaliatory act or harassment that results in an adverse effect on the terms, conditions, or benefits of employment.) As such, *Reeves* mandates that summary judgment be denied. The Fourth Circuit erred by not either remanding the case for judgment in accordance with *Reeves* or reversing the summary judgment motion on the merits.

CONCLUSION

For the above reasons, a Write of Certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully Submitted,



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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BENITA SHVAUGHN HARRIS,

Plaintiff-Appellant,

No. 99-1627

v.

COCA-COLA BOTTLING COMPANY CONSOLIDATED,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of North Carolina, at Charlotte.
Graham C. Mullen, Chief District Judge.
(CA-97-459-3-MU)

Submitted: September 27, 2000

Decided: August 16, 2001

Before WIDENER, WILKINS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Geraldine Sumter, FERGUSON, STEIN, WALLAS, ADKINS, GRESHAM & SUMTER, P.A., Charlotte, North Carolina, for Appellant. Gregory P. McGuire, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, L.L.C., Raleigh, North Carolina; Lucretia D. Guia, HAYNSWORTH, BALDWIN, JOHNSON & GREAVES, L.L.C., Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Benita Shvaughn Harris appeals an order of the district court granting summary judgment to her former employer, Coca-Cola Bottling Company Consolidated (Coca-Cola), on her claims of retaliatory hostile environment and retaliatory discharge. *See* 42 U.S.C.A. § 2000e-3(a) (West 1994). Finding no error, we affirm.

I.

Harris, who is African-American, was employed by Coca-Cola as an administrative assistant from January 1994 until her termination in November 1996. Harris' difficulties began in August 1994, when Steve Hewitt became Manager of Organizational Development Hewitt and Harris had

several disagreements concerning Harris' work in general and particularly the assistance Harris provided Hewitt.

Harris' problems took a different turn in July 1996, when Coca-Cola participated in a job fair held in conjunction with a National Association for the Advancement of Colored People convention. In anticipation of the job fair, Coca-Cola placed an advertisement in *The Charlotte Observer* that stated relevant part as follows:

> **Opportunity Has Never Tasted Better**
>
> **Sales Manager Trainees** Coca-Cola Bottling Company Consolidated will be recruiting at the NAACP Job Fair for Sales Management Trainees. The successful candidates will have a Bachelor's degree and a minimum of 6-12 months sales or management experience. In addition, successful applicants will possess excellent communication skills (i.e. listens attentively, uses proper grammar, gets point across, etc.), leadership traits (i.e. sets a good example, demonstrates initiative, maintains self-control under pressure) and a high degree of integrity, among other skills and abilities.

J.A. 233. The advertisement had been prepared by Hewitt, whose responsibilities included recruiting qualified minorities. Harris read the ad in the *Observer* and decided that the inclusion of the parentheticals was degrading because it implied that African-Americans needed the parentheticals to understand what good communication skills and leadership traits were. After she reported her concern to her supervisors, the company decided that future advertisements would not contain the language to which Harris objected.

Harris' objection to the advertisement did not end with this decision, however. Rather, Harris continued to show the advertisement to other Coca-Cola employees and solicit their reactions. This conduct infuriated Hewitt, who perceived Harris' actions an insinuation that he was a racist. As a result of Harris' conduct, Harris' supervisor met with her and placed a report in her personnel file. The report stated, among other things, that Harris needed to reduce the time she spent discussing non-business matters with her co-employees. The report also noted that the same issue had arisen with Harris during previous performance reviews.

After the meeting, Harris continued to show the advertisement to other Coca-Cola employees and discuss it with them. Several additional meetings concerning Hewitt and the advertisement followed, and Harris was eventually warned that if she could not move beyond her personal differences with Hewitt, she could be terminated.

In mid-November, Harris was informed that Hewitt was receiving a promotion. Harris responded by sending an e-mail to the company president with copies to several company executives and the board chairman expressing outrage at the employment decision and disparaging Hewitt for, among other things, his preparation of the *Observer* advertisement. Harris was subsequently terminated.

Following her termination, Harris brought suit against Coca-Cola, alleging, *inter alia*, that she was subjected to a hostile work environment in retaliation for her objection to the advertisement and that she was discharged in retaliation for sending the e-mail protesting Hewitt's promotion. The district court granted summary judgment against her on those claims, ruling in both instances that the conduct Harris claimed prompted the retaliation was not protected conduct under Title VII.

II.

Harris contends that the district court erred in concluding that the conduct that she claims prompted retaliation by her employer was not protected under Title VII. Having had the benefit of oral argument and the parties' briefs, and after careful consideration of the record and the applicable law, we conclude that the district court correctly decided the issues before it. Accordingly, we affirm substantially on the reasoning of the district court.*

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:97CV459-MU

BENITA SHVAUGHN HARRIS,

Plaintiff,

vs.

COCA-COLA BOTTLING COMPANY

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* In her reply brief, Harris contends for the first time that her protected activity forming the basis for her retaliation claims was not limited to opposing the *Observer* ad and sending the e-mail. This argument is not properly before this court and we decline to address it. *See Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n.2 (4th Cir. 1996) (holding that an issue first argued in a reply brief is not properly before this court).

CONSOLIDATED,

Defendant.

JUDGMENT IN A CIVIL CASE

[stamp – FILED APR 14 1999 Clerk, U.S. District Court Charlotte, N.C.

MULLEN, Chief Judge

DECISION BY COURT. This action having come before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in accordance with the Court's April 14, 1999 Order.

/s/ Graham C. Mullen
United States District Judge

April 14, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:97CV459-MU

BENITA SHVAUGHN HARRIS,

Plaintiff,

vs.

COCA-COLA BOTTLING COMPANY CONSOLIDATED,

Defendant.

ORDER

[stamp – FILED APR 14 1999 Clerk, U.S. District Court Charlotte, N.C.

MULLEN, Chief Judge

This matter is before the court upon Defendant's Motion for Summary Judgment. Plaintiff, a former employee of Coca-Cola Bottling Company Consolidated (the "Company"), filed this action seeking relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e),et seq., 42 U.S.C. § 1981, and the common law of North Carolina. Plaintiff alleges that she was discriminated against and retaliated against in the scope and course of her employment with Defendant because of her race (black). The Complaint alleges four claims for relief: (1) race discrimination in termination, (2) race discrimination in discipline, (3) hostile work environment, and (4) retaliatory termination.

FACTS

As it is required to do, the court views the facts in the light most favorable to the Plaintiff. Plaintiff, Benita Shvaughn Harris, was employed as an Administrative Assistant to Dave Brown, the Director of Organizational Development at Defendant's headquarters in Charlotte, North Carolina, from January, 1994 until her termination on November 15, 1996. Brown (white) was the person responsible for both hiring and firing the Plaintiff. Plaintiff's job responsibilities included providing clerical and administrative support to Dave Brown and others in his department. She was also responsible for answering the telephone for Dave Brown and

for Bob Pettus, the Vice President for Human Resources, and substituting for other support persons in the department when necessary. Plaintiff's clerical duties included maintaining documents and filing documents with respect to the Defendant's recruitment efforts, training efforts, and its assessment center. Plaintiff received annual evaluations all of which were complimentary of her work performance and which included pay raises. Defendant concedes that Plaintiff's work performance met expectations.

In August, 1994, Defendant promoted Steve Hewitt, a division Human Resources Manager to the position of Manager of Organizational Development in the Charlotte office. Hewitt reported directly to Brown. As Manager of Organizational Development, Hewitt was primarily responsible for recruiting and training. Hewitt also had responsibility for recruiting qualified minorities. Almost immediately after Hewitt's arrival in Charlotte, Plaintiff and Hewitt clashed over the scope of Plaintiff's responsibilities to Hewitt. Hewitt did not believe that Plaintiff provided sufficient assistance to him in his new position. Hewitt also believed that Plaintiff was a disruptive influence in the department and that she did not do her fair share of work. Plaintiff reported her clashes with Hewitt to Brown. Hewitt also complained to Brown about Plaintiff. Brown told Hewitt he would have to learn to work with Plaintiff. In September, 1995, Hewitt hired Johnna Snell (black) to assist him. Hewitt and Snell got along well, and Hewitt was pleased with Snell's work.

In July, 1996, the National Association for Advancement of Colored People (NAACP) held its annual convention in Charlotte. Hewitt initiated the Company's participation in the job fair held in conjunction with the NAACP convention. Hewitt asked Plaintiff and several other employees, both black and white, to participate by staffing

the booth at the job fair. Hewitt also prepared an advertisement to be placed in *The Charlotte Observer* regarding the job fair. The advertisement read as follows:

> **Opportunity Has Never Tasted Better**
>
> **Sales Manager Trainees** Coca-Cola Bottling Company Consolidated will be recruiting at the NAACP Job Fair for Sales Management Trainees. The successful candidates will have a Bachelor's degree and a minimum of 6-12 months sales or management experience. In addition, successful applicants will possess excellent communication skills (i.e. listens attentively, uses proper grammar, gets point across, etc.), leadership traits (i.e. sets a good example, demonstrates initiative, maintains self-control under pressure) and a high degree of integrity, among other skills and abilities.
>
> If you're willing to roll-up your sleeves and work hard for a leader in the exciting, competitive, and rewarding soft drink industry, we'd like to talk with you.
>
> Apply in person at our booth at the Job Fair or submit a resume, in strict confidence to: Manager, Organizational Development, Coca-Cola Bottling Co. Consolidated, Dept. JF-SMT796, P.O. Box 31487, Charlotte, NC 28231-1487. An Equal Opportunity Employer which values the diversity of its employees, customers and consumers.

The advertisement ran in *The Charlotte Observer* on Sunday, July 7,1996. Hewitt adapted the parenthetical definitions of "communication skills" and "leadership traits" from the

definitions provided in the Company's "career development plan" form.

Plaintiff saw the ad in the *Observer* and was concerned that the ad would be a problem for the Company because she felt it was degrading to African-Americans. On Monday morning, July 8, Plaintiff approached Dave Brown and relayed her concerns that the ad was derogatory to African-Americans. Brown mentioned that his wife had also seen the ad and questioned why it included the parenthetical definitions. Brown told Plaintiff that he would speak to Hewitt about the advertisement. Brown met with Hewitt and discussed the concerns raised by Plaintiff about the parenthetical definitions. Hewitt and Brown agreed that he would not include the definitions in future advertisements. The Company never ran any other advertisements with the definitional language. Defendant received no complaints about the advertisement from any other Company employees, from the public, nor from any attendees at the NAACP job fair.

After speaking with Brown, Plaintiff showed other Company employees the ad and asked for their reactions. Plaintiff maintains that she only spoke to the following employees about the ad between July 8 and July 10, 1996: Garland Henderson, Sandra Smith, Debbie Austin who walked in as Plaintiff was talking to Smith, and Johnna Snell. Johnna Snell informed Hewitt that the Plaintiff had been soliciting comments from other employees about the ad, and Hewitt became very upset. Hewitt believed that Plaintiff was implying that he was a racist, and felt that his position as the key company official responsible for recruiting additional minorities and females into the company was being undermined by Plaintiff's conduct.

On July 10, Hewitt called Brown, who was in West Virginia on a business trip, and complained to Brown about Plaintiff's conduct. Hewitt was upset during the phone call. Brown told Hewitt that Brown would address the issue when he returned from his trip. After returning to Charlotte, Brown investigated and confirmed that Plaintiff had shown the advertisement to other employees and solicited their reactions.

The following Monday, July 15, 1996, the Plaintiff was summoned to Brown's office and was told by Brown that his direct reports had problems with her and that they thought she was unapproachable. In addition, Brown informed the Plaintiff that Steve Hewitt had reported that she had solicited comments about the ad from others. Plaintiff was told that she was perceived as being uncooperative and that if she had time to solicit comments about the ad, that she did not have enough work to keep her busy. She was further informed that Brown would make a decision about the matter and would inform her of his decision.

The following day, Brown advised the Plaintiff that he was going to write her up for soliciting comments on the ad. Brown stated that she was being written up because she questioned a manager and because of her poor utilization of time. She was further told that Brown was going to schedule a team building for all of his direct reports. The Plaintiff requested that the write up be postponed until after the team building because she felt that the team building would reveal that Steve Hewitt had a problem with her as a woman of color. Her request was not granted.

The Plaintiff states that after she complained about the ad to Brown, she was treated differently. For example, her access to the Company's computer system, CHRIS, was restricted. Plaintiff believed that the other three

Administrative Assistants in her office had company-wide access, whereas the Plaintiff's access was restricted to the three divisions over which Brown had responsibility. Plaintiff also complains that in August, Brown asked her to remove scripture from her screen saver. However, she offers no evidence that others were allowed to display scripture on their screen savers.

On July 22, Brown verbally counseled with Hewitt and the Plaintiff. Brown counseled Hewitt for his emotional outburst during the telephone conversation on July 10. The documented counseling to Hewitt read as follows:

> A meeting was held in my office on Monday, July 22, 1996 regarding the recent incident pertaining to his phone call to me regarding the recent N.A.A.C.P. advertisement and related incident involving Shvaughn.
>
> 1. I would not tolerate another phone call again from Steve as when he called me in Charleston, W.VA on Wednesday afternoon, July 10, 1996, to tell me about Shvaughn discussing the N.A.A.C.P. ad with other employees. He was very emotional, displayed a very hateful tone toward me. Steve must learn to control his emotions, especially when he is involved in an emotional situation.
>
> 2. I would be announcing a team building effort for sometime in mid-August, 1996. He would make every effort possible to develop a reasonable work relationship with Shvaughn. One of the key points in this training would be giving feedback directly to each other, versus to me, about Shvaughn's behavior, and his accepting feedback from others.

Brown counseled the Plaintiff regarding her use of time to conduct discussions outside the scope of her job duties. Brown explained that based on his observations of the amount of time Plaintiff spent away from her desk, and based on conversations with other department employees, he believed Plaintiff was spending too much time on non-business related matters. Brown documented the counseling in Plaintiff's personnel file as follows:

> On Monday, July 22, 1996, I met with Shvaughn in my office to discuss with her the future behavior I expected her to follow with regard to the amount of time she spends in discussions with other Human Resources employees.
>
> 1. I again emphasized her need to reduce the time she spends conducting non-business discussions with other employees in the Human Resources' [sic] Department. We have discussed this issue previously in conjunction with her annual and periodic performance reviews in 1995 and February, 1996.
>
> Also, the use of temporary help to replace LaToya when she leaves for school was being placed on hold until I saw improvement with relation to her utilization of time noted above. I would then have a better understanding of whatever temporary help was needed.
>
> Finally, I explained to Shvaughn that people under me at Corporate expressed to me during my investigation, that they wanted more help from her but felt reluctant to ask her for it. I explained that we would begin a team building effort and I hoped this would provide her better clarification, as to what behaviors she exhibited, that made them feel this

> way. Also, the need for them to give her feedback, versus they [sic] telling me, would help her understanding.

Brown told Plaintiff that he did not view the document as a corrective action or discipline, and that it could be removed from her file at any time. In the July 22 meeting, Brown also counseled Plaintiff about the scope of her job responsibilities. He informed her that once she had reported to Brown any complaints or problems, it was his responsibility to address the issue. Brown documented this portion of the conversation to his incident file. This documentation was not placed in the Plaintiff's personnel file.

Plaintiff responded to the counseling memo on August 5, 1996 and copied it to Bob Pettus. In her response, Plaintiff expressed her disappointment that her interest in trying to alert the company to concerns by African-Americans about the content of the ad was being misconstrued in a negative way. She further expressed her concern that the counseling memo was retaliatory.

After being counseled, Plaintiff continued to show the ad to other employees and get their reactions. Plaintiff, at her request, met on several occasions with Brown, Bob Pettus and Bobbie Fritzen, a Regional Director of Human Resources and the Corporate Human Resources Manager. In August, 1996 she discussed with Bobbie Fritzen the difficulties that she had with Steve Hewitt and her feelings that the ad that was placed in *The Charlotte Observer* was insensitive and degrading. Fritzen suggested that there be a meeting between the parties to see if the matter could be worked out.

The Plaintiff and Hewitt met with Dave Brown on August 27, 1996. Both the Plaintiff and Hewitt were emotional about the issue. In addition to expressing his anger directly at Plaintiff for raising the issue about the ad, Plaintiff states that Hewitt said that he wanted her gone, that he wanted nothing to do with her professionally, socially or otherwise, that Plaintiff was not loyal, not trustworthy, lacked integrity and was "not even a Christian." Plaintiff also states that Hewitt said that he had "gone against the Jim Moore [the Company's president] and Norm Georges [a Division Vice President] of the Company to hire minorities."

On August 29, 1996, Plaintiff met with Dave Brown and questioned him about her opportunities for getting promoted given the fact that Hewitt had indicated that he had gone against Jim Moore and others in hiring African-Americans. At that time, Dave Brown told Plaintiff that Hewitt was only emotional at the time and really did not mean what he had said.

On September 6, 1996, Pettus met with Plaintiff and Hewitt together and asked both of them to put their personal differences behind them. He told them that he would remove the documentation of the July 22 counseling from their respective files. Plaintiff told Pettus that she would not put her differences with Hewitt behind her without an apology from Hewitt. Hewitt believed that Pettus was warning him and Plaintiff that if they did not put their personal differences behind them, they would both be terminated. Indeed, Dave Brown had told the Plaintiff that if she could not put her personal differences with Hewitt behind her that she "may be looking for another job." (Brown Deposition, p.153) Plaintiff admits that following the September 6 meeting with Pettus, Hewitt was cordial and professional towards her throughout the remainder of her employment with the Company.

On September 9, 1996, Plaintiff met with Bob Pettus alone and expressed concern that she was being retaliated against because of the fact that she raised concerns about the NAACP ad. She also expressed concern that she was professionally vulnerable because Steve Hewitt had indicated that he wanted her fired and had hinted that Jim Moore and Norm George did not want minorities hired. In addition, she alleged that she had been denied opportunities in the past for advancement in the Human Resources Department. With regard to her personal dispute with Hewitt, Plaintiff told Pettus that in order for the matter to be resolved, she would need to receive an apology from Steve Hewitt. Plaintiff also states that during the meeting with Pettus, she specifically expressed the need for the Company to be sensitive to the diversity of its employees. On October 16, 1996, Pettus sent Plaintiff a memo summarizing the September, 1996 meeting wherein he asked that she identify for him various phrases or actions which might be viewed as racially insensitive. Plaintiff declined to provide such a list..

In early November, Plaintiff expressed interest in an open position for benefits administrator. Defendant chose to seek applicants from outside the Company because of the qualifications needed. Plaintiff admittedly did not possess the qualifications the Company was seeking for the position. Pettus met with the Plaintiff and explained the reasons she was not qualified. Plaintiff claims that in 1995 she expressed an interest in a similar position and was told that she was over-qualified. During her conversation with Bob Pettus, he told her that it was obvious that she had not put the situation with Steve Hewitt behind her and that for her sake she should forgive Steve Hewitt. He promised that he would sit down with Dave Brown and come up with a plan for her career and development at the Company.

On November 13, 1996, Dave Brown met with the Plaintiff and told her that he and Bob Pettus had met and had come up with the following suggestions for her:

1. Stay in her current position and she would get part time help with the clerical duties.

2. Move to a field position at southern division provided a position is available.

3. Look at a position selling vending machines or fountain equipment.

4. Transition out of the CCBCC into another company for which the Company would pay outplacement services and provide four to six weeks pay. That same day, Brown informed the Plaintiff that Hewitt was being promoted to the position of Director of Learning and Development. Plaintiff expressed her shock and dismay that the Company would promote a person such as Steve Hewitt to a director position and that she was very disappointed that her talents and abilities were not being recognized.

On the afternoon of November 14, Plaintiff sent an e-mail to Jim Moore, which she copied to Norman George, Frank Harrison, III, Defendant's Chairman of the Board, Pettus, Brown and Fritzen. The e-mail read as follows:

> Mr. Moore: Dave Brown informed me yesterday that Steve Hewitt is being promoted to a director. I'm outraged that CCBCC has seen fit to promote Steve. This is a man, who told me in a meeting with Dave Brown, that you and "the Norm George of this Company did not want minorities here". He also told me that one of us did not need to be here and that he had a wife and family and that he needed his job and

> demanded that Dave Brown fire me because I brought to the Company's attention a job advertisement Steve placed in the Observer that African Americans considered insensitive and degrading. I had also informed Bobbie Fritzen and Bob Pettus of this matter and I cannot believe that CCBCC would reward such outrageous behavior with a promotion. Respectfully, Shvaughn Harris

After seeing the e-mail, Brown met with Bobbie Fritzen and they decided to terminate Plaintiff's employment. Steve Hewitt had no role in the decision to terminate Plaintiff's employment nor in any other employment decisions regarding Plaintiff. Defendant gave four reasons for Plaintiff's termination:

1. Brown believed that Plaintiff had refused to put her differences with Hewitt behind her as he and Pettus had asked her to do.

2. Brown was upset with Plaintiff for going directly to Moore, Harrison and George with her objection to Hewitt's promotion instead of coming to him.

3. Brown believed Plaintiff's e-mail message contained several inaccuracies. First, Plaintiff did not put in her message that Hewitt retracted his statement that he wanted her "gone." Also, Brown took issue with the quoted portion of the e-mail in which Plaintiff alleged that Hewitt had stated that "the Norm George of this Company did not want minorities here." Brown did not believe this was an accurate account of Hewitt's statement and Brown believed Plaintiff had defamed Hewitt "in the eyes of Franklin Harrison."

4. Brown lost his trust in Plaintiff and did not want to work with her any longer.

DISCUSSION

Summary judgment is appropriate when the defendant establishes that there is no genuine issue of material fact to be tried by a jury. Fed. R. Civ. P. 56 (c). While all favorable inferences from the material facts must be given to the non-moving party, that party only creates a genuine issue of fact when she produces evidence that would create a reasonable probability, and not a mere possibility, of a jury finding in her favor. Cook v. CSX Transp. Corp, 988 F.2d 507, 512 (4th Cir. 1993); Lovelace v. Sherwin-Williams Co, 681 F.2d 230, 242 (4th Cir. 1982).

A. Discriminatory Termination

In her first claim for relief, Plaintiff alleges that she was terminated because of her race in violation of Title VII, 42 U.S. C. § 1981 and North Carolina common law. Plaintiff faces the same burden of proof in establishing her race discrimination claims under Title VII, § 1981 and state common law. See Patters on v. McLean Credit Union 491 U.S. 164, 181-82 (1989); N.C. Dept. of Corrections v. Gibson, 308 N.C. 131, 141, 301 S.E. 2d 78, 85 (1983).

Since this is not a case involving direct evidence of discrimination, Plaintiff's claims must be assessed under the well-established circumstantial evidence proof scheme developed in discrimination cases. Karpel v. Inova Health Sys. Service 134 F.3d 1222, 1227-28 (4th Cir. 1998). Plaintiff must first establish a prima facie case of discriminatory termination by raising an inference of race discrimination. Id. The Defendant may rebut this inference by producing evidence of a legitimate reason for the

Plaintiff's termination. If Defendant produces evidence of a legitimate reason, the Plaintiff must come forward with evidence establishing that the Defendant's reasons are a pretext and that Defendant was, in fact, unlawfully motivated by the Plaintiff's race. Hicks v. St. Mary's Honor Center 509 U.S. 502 (1993);Gillins v. Berkeley Electric Cooperative, Inc., 148 F.3d 413 (4th Cir. 1998).

A prima facie case of discriminatory discharge requires Plaintiff to establish: (1) that she is in a protected class, was qualified for her position at the time of termination, and was terminated; and (2) that she was terminated under circumstances giving rise to an inference of unlawful discrimination. Cf. Johnson v. Radio Shack/Tandy Corp, 1998 U.S. Dist. LEXIS 6420, at * 13 (W.D.N.C. 1998) The second prong requires evidence of a causal connection between the plaintiff's race and the termination. Id. at * 13-14. This inference of a causal connection usually is made by showing either that plaintiff was replaced by a non-protected individual or that she was terminated in circumstances under which a similarly situated non-protected employee was not.

It is not disputed that Plaintiff was in a protected class, was performing her duties satisfactorily, and was terminated. In addition, Plaintiff has filed a Declaration in which she states that she was replaced by a white female named Donna Berryhill. Thus, Plaintiff is able to establish a prima facie case.

Defendant has brought forth legitimate, nondiscriminatory reasons why Plaintiff was terminated. Specifically, Defendant's evidence is that Plaintiff was terminated because (1) she refused to put her differences with Hewitt behind her as she had been asked to do by Brown and Pettus, (2) Brown lost his trust in Plaintiff

because she went directly to Moore, Harrison and George with her opinions about Hewitt's promotion instead of coming to him first, and (3) Brown's belief that the contents of Plaintiff's e-mail message were inaccurate and misleading. Plaintiff admits that these are the reasons Brown gave her for her termination.

Plaintiff has no evidence that would create a disputed issue as to the legitimacy of Brown's reasons for terminating her. To the contrary, Plaintiff admits she refused to put the situation with Hewitt behind her and move on when she was asked to do so by Pettus. Plaintiff testified that she would not put the situation behind her without an apology from Hewitt. Moreover, there is no evidence that Brown did not legitimately believe that Plaintiff's account of the statements made by Hewitt in the August 27 meeting were inaccurate and misleading. With regard to her statement in the e-mail that Hewitt said her wanted her fired, Plaintiff admits that in the August 27 meeting with Brown and Hewitt, Hewitt had immediately retracted this statement. She did not mention Hewitt's retraction in her e-mail. Brown stated that he considered this a significant omission. While Brown and Plaintiff differ over whether Hewitt mentioned Norman George in the August 27 meeting, there is no evidence that Brown did not honestly have a different recollection of Hewitt's statement. To the contrary, Brown's notes prepared immediately following the August 27 meeting reflect that Hewitt used only Jim Moore's name, and not Norman George's. In a case alleging unlawful motivation, the critical issue is not whether Plaintiff's e-mail is in fact inaccurate and misleading, but rather whether Brown in good faith believed it was inaccurate and misleading. Elrod v. Sears, Roebuck & Co, 939 F.2d 1466, 1470 (11th Cir. 1991); Smith v. Papp Clinic, P.A, 808 F.2d 1449, 1452-53 (11th Cir. 1987).

Plaintiff also has no evidence that Brown had not, in fact, lost trust in her because she circumvented him with her feelings about Hewitt's promotion. Brown believed that sending the e-mail directly to Moore and Harrison, who knew nothing about the situation, showed "very poor judgment on [Plaintiff's] part" (Brown Deposition, p.171). Brown testified that "my feeling was that I did not want [Plaintiff] working for me anymore, that I couldn't trust her." Id. at p. 175). Plaintiff has no testimonial or documentary evidence that Brown concocted this reason to cover up race discrimination.

Plaintiff attempts to show pretext by arguing that she was fired for complaining to members of management when in fact that very process is encouraged by Defendant's written "open door" policy for redressing employee's concerns. However, Brown testified that it was his belief that the Plaintiff exhibited "very poor judgment" by going to the president of the Company and others who knew nothing about the situation with a misleading e-mail that defamed Hewitt and Norm George. As noted above, Plaintiff simply has no evidence that Brown's feelings were not genuine, that his stated reasons for terminating her were not true, and that the real reason was race discrimination. Defendant is entitled to judgment as a matter of law on Plaintiff's claim of race discrimination in termination.

B. Discriminatory Discipline

Plaintiff alleges that the counseling session with Brown on July 22, 1996 and the memo sent to her as a result of the counseling was motivated by race. To show a prima facie case of discriminatory discipline, a plaintiff must show that she was treated more harshly than an employee or employees outside the protected class who engaged in conduct of comparable seriousness. Cook, 988 F.2d at 511.

The comparison employees must be "similarly situated" to the plaintiff, taking into account the nature of the offense, their respective disciplinary histories, and other relevant facts. Id. Accordingly, "[t]he question confronting a judge faced with determining whether a prima facie case under Title VII has been made is whether the record as a whole gives rise to a reasonable inference of racially discriminatory [discipline] by the employer." Id. at 512. Here, the record as a whole contains no facts to support an inference that the July 22 counseling given to Plaintiff was based on her race.

Plaintiff is unable to establish a prima facie case of discriminatory discipline, as she can produce no evidence that the counseling at issue was racially motivated. Moreover, it is questionable whether the counseling was even disciplinary in nature. Defendant has presented evidence that Brown did not consider the counseling with Plaintiff disciplinary in nature and told her it could be removed from her file at any time. In fact, Pettus removed the documentation of the counseling from Plaintiff's file on September 6, 1996.

Plaintiff has no evidence that she was treated more harshly than a white employee who engaged in conduct of comparable seriousness. The undisputed facts show that Brown counseled both Hewitt and Plaintiff on the same day for their respective conduct. Plaintiff argues that other employees spent time discussing non-business related matters and were not disciplined. However, there is no evidence that Brown was aware of any other employee engaged in the same amount of non-business discussions as Plaintiff. Brown testified that he based his counseling of

Plaintiff on his personal observations of the amount of time Plaintiff was away from her work area and on information from other employees he spoke with. Brown stated that he was not aware of any other employees spending comparable time in non-business discussions. Moreover, Brown had spoken with Plaintiff prior to July 22, 1996 about the effective use of her time, and had documented it on at least one performance review. There is no evidence in the record that anyone had held similar discussions with any other employee. Under these circumstances, there are no employees similarly situated to Plaintiff. Accordingly, Plaintiff cannot make out a prima facie case of discriminatory discipline.

C. Harrassment

Plaintiff claims that she was subjected to a racially hostile work environment. The Supreme Court recently has reiterated that a "hostile environment" is only actionable under Title VII if the conduct was motivated by an intent to discriminate or. the basis of a protected characteristic. Oncale v. Sundowner Offshore Services, 523 U. S. 75 (1998). Not all snubs and slights in the work place, even between members of different races, are racially motivated. Those acts that are not based on intentional race discrimination are not actionable under Title VII.

In addition to being motivated by race, conduct creating a hostile environment must be highly offensive, substantial and ongoing. Booth v. N.C. Dept. of Environment 899 F. Supp. 1457, 1463 (E.D.N.C. 1995). A racially hostile working environment must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere. The existence of a hostile environment cannot be predicated upon acts that are isolated or genuinely trivial. Whether racially motivated conduct

rises to the level of "severe and pervasive" is measured from both a subjective and objective standpoint. Id. at 1464. In Booth, the Court held that the plaintiff must show (1) that the conduct "'interfered with her ability to perform her work or significantly affected her psychological well-being'" and (2) that the conduct "'would interfere with the work performance or significantly affect the psychological well-being of a reasonable person in the plaintiff's position.'" Id.

The Plaintiff simply has no admissible evidence that is sufficient to create a genuine issue of material fact with regard to this claim. The only time Plaintiff ever personally heard a slur used was when her friend and co-worker, Sandra Smith, used the term "nigger-rigged." Plaintiff testified that Smith immediately apologized to her. Plaintiff admits that she did not report Smith's statement to anyone at the time. When Plaintiff later mentioned the incident to Bob Pettus she asked him to promise he would take no action against Smith. This single occasion on which Plaintiff heard a slur does not even arguably rise to the level of "severe and pervasive" conduct that creates a hostile work environment.

Plaintiff argues in her brief that there was racial name-calling in the workplace, that a supervisor in the mail room named her cat "nigger,"and that someone attributed a racial comment to the president of the Company. However, Plaintiff's evidence of racial slurs constitutes hearsay, and in the instance of the statement attributed to the Company president, double hearsay. Inadmissable hearsay evidence of this type does not create a genuine issue of fact precluding entry of summary judgment. Greensboro Professional Fire Fighters Ass'n. v. City of Greensboro, 64 F.3d 962, 967 (4th Cir. 1995).

Aside from her inadmissible evidence of racial slurs, Plaintiff has no other evidence that she was subjected to a racially hostile work environment by virtue of anyone's treatment towards her. While Hewitt and the Plaintiff both acknowledge that they did not get along with each other, Plaintiff has no evidence that Hewitt's behavior towards her was based on race. In fact, it is undisputed that Hewitt hired a black assistant to work with him. Moreover, Plaintiff admits that Hewitt never directed any racially derogatory terms towards her and never verbally or physically threatened her.

In addition to her claim of a racially hostile work environment, Plaintiff alleges that she was subjected to a retaliatory hostile work environment by virtue of the way she was treated after alerting the Defendant to the derogatory nature of the NAACP ad. In order to state a claim for retaliatory hostile work environment, Plaintiff must establish that she: (1) engaged in protected activity; (2) was subjected to unwelcome harassment; (3) the unwelcome harassment was causally connected to the plaintiffs protected activity; (4) the harassment vas severe and pervasive; and (5) a basis exists for imputing liability to the employer.

Fleming v. The South Carolina Dept. of Corrections 952 F.Supp. 283, 290 (D.S.C. 1996). With regard to the first element, Plaintiff must establish that she engaged in "protected activity." Protected activity falls into two catagories: participation activity and opposition activity. See 42 U.S.C. § 2000e-3(a). "Participation" activities differ from "opposition" activities, and the latter are afforded a lesser degree of protection. Laughlin v. Metropolitan Washington Airport Authority, 149 F.3d 253 (4th Cir. 1998). Participation activity includes making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII. Id. Opposition

activity is opposing conduct made unlawful under Title VII. In order to be protected opposition activity, an employee's conduct must "oppose[] [a] practice made an unlawful employment practice by this subchapter,.. ." 42 U.S.C. § 2000e-3(a); see Jamil v. Secretary, Dept. of Defense 910 F.2d 1203, 1207 (4th Cir. 1990)(to be protected, opposition must be "`to conduct or practices violative of Title VII'").

Not all protests or complaints that in some way invoke racial bias are protected by Title VII. See Holden v. Owens-Illinois. Inc, 793 F.2d 745 (6th Cir. 1986) (employee's zealous attempts to implement affirmative action plan and her expressed concerns about concentration of blacks in low level job group not protected activity under Title VII); Evans v. Kansas City School District, 65 F.3d 98 (8th Cir. 1995)(teacher's opposition to principal's implementation of school desegregation plan that he believed disregarded needs of back students was not protected opposition under Title VII); Jamil, 910 F.2d 1203 (complaints of department mismanagement and cronyism not protected opposition under Title VII). While it is not necessary that a plaintiff prove that the employer actually committed a violation of Title VII, the employee must show that she "opposed an unlawful employment practice which [s]he reasonably believed had occurred or was occurring." Bigge v. Albertsons. Inc., 894 F.2d 1497, 1503 (11th Cir.1990). It is not sufficient that the plaintiff have a good faith, subjective belief that she was opposing an unlawful practice. That belief must also be objectively reasonable. Little v. United Technologies, 103 F.3d 956, 960 (11th Cir. 1997); Evans, 65 F.3d at 100-01.

Here, Plaintiff claims that she was subjected to retaliatory treatment for opposing the ad in the *Observer* which she considered to be derogatory to blacks. She claims that this retaliatory treatment constituted a hostile work

environment. However, the conduct which she opposed, the wording of the ad, is not a practice violative of Title VII. Indeed, Plaintiff does not even argue that the running of the ad violated Title VII. Even if she had a good faith belief that the ad violated Title VII, that belief could not be considered objectively reasonable. Hence, as a matter of law, her claim of retaliatory hostile work environment must fail.

D. Retaliatory Discharge

In her fourth claim for relief, Plaintiff alleges that "Defendant's termination of plaintiff was in retaliation for sending the e-mail wherein she complained of Defendant's discriminatory practices" and was in violation of Title VII, § 1981 and North Carolina common law. To establish a prima facie claim of retaliatory termination under Title VII, Plaintiff must establish (1) that she engaged in protected activity, (2) that she was terminated, and (3) that there was a causal link between the two. Beall v. Abbott Laboratories, 130 F.3d 614, 619 (4th Cir. 1997). While Plaintiff argues that her e-mail constituted both "opposition" and "participation" activity, the court finds that there was no participation activity as defined by § 704(a). Thus, Plaintiff's conduct can only be described as opposition activity.

Plaintiff cannot establish a prima facie case of retaliatory discharge because her e-mail expressing her "outrage" at Steve Hewitt's promotion was not opposition to a practice violative of Title VII. Plaintiff's complaint was not that Defendant's decision to promote Hewitt was discriminatory or unlawful. She did not oppose Hewitt's promotion, for example, because Defendant selected him over an equally or better qualified minority candidate. Rather, Plaintiff believed that the promotion was a poor business decision and that it was unfair to promote Hewitt in

light of his past behavior towards her. Plaintiff explained the reasons for sending the email as follows:

> Q. Why did you feel so strongly or object so strongly to Steve Hewitt getting the promotion?
>
> A. Well, I felt that, you know, he had started speaking to me and ---and, you know, things were going okay. But there was never the apology for what had happened and no one---other than Bob Pettus saying this was not Jim Moore's position. And for---my perception was that for a man in his position to make that statement about the president of a company to be promoted, I felt he was being rewarded for---for behavior that I felt was just abhorable.
> An that's why I e-mailed Mr. Moore when I realized that, you know, Bob Pettus
> and Dave Brown, you know, pretty much were not saying very much about it, because I felt Mr. Moore needed to know.

(Plaintiff's Deposition, pp. 212-213).

Plaintiff does not even contend that she believed Defendant's decision to promote Hewitt was unlawful. She also does not contend, and does not state in her e-mail, that she believes Hewitt's rude behavior towards her was unlawful or discriminatory. Plaintiff's own explanation of her reasons for opposing Hewitt's promotion demonstrate that she did not have a good faith, subjective belief that the decision to promote him was unlawful. Plaintiff believed Hewitt was a poor choice for the position given his behavior towards her, not that Defendant violated Title VII by promoting him. Title VII, however, is not a "bad acts" statute. Jamil, 910 F.2d at 1207; Crowley v. Prince George's

County, Md., 890 F.2d 683, 687 (4th Cir. 1989). Opposition to uncivil, and even unfair, behavior is not protected. Objectively, Defendant's promotion of Hewitt was not unlawful and could not reasonably have been viewed as unlawful. Plaintiff argues that her e-mail constituted more that a complaint about Hewitt's promotion, but was a complaint about Defendant's insensitivity to the concerns of blacks. Moreover, she contends that the e-mail voiced concern and opposition to what she understood to be racial animus by the president of the Company. She claims that viewed in the light most favorable to her, the e-mail was a protest against the manner in which blacks were treated. Paragraph 8 of Plaintiff's Complaint states that her e-mail "specifically complained of racial insensitivity and questioned Defendant's commitment to hiring minorities."

Despite Plaintiff's personal characterization of her e-mail message, she cannot a raise a genuine issue of material fact that the e-mail was anything more than opposition to Hewitt's promotion, which, as discussed above, was not unlawful under Title VII. The court finds that no reasonable factfinder could conclude by reading Plaintiff's e-mail that she was protesting the Company's treatment of blacks, or its commitment to hiring minorities. As Plaintiff cannot establish that she engaged in opposition activity protected by Title VII, she fails to make a prima facie showing of retaliation and Defendant is entitled to judgment as a matter of law.

CONCLUSION

Having considered each of Plaintiff's four claims, the court finds that there is no genuine issue of material fact and that summary judgment in favor of the Defendant is appropriate.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment is hereby GRANTED.

/s/ Graham C. Mullen
United States District Judge

April 14, 1999

(2)

No. 01-699

Supreme Court, U.S.
FILED
DEC 19 2002
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IN THE

Supreme Court of the United States

BENITA SHVAUGHN HARRIS,

Petitioner,

v.

COCA-COLA BOTTLING CO. CONSOLIDATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Coca-Cola Bottling Co. Consolidated is a publicly traded corporation. The Coca-Cola Company, a publicly traded corporation, owns 10% or more of the stock of Coca-Cola Bottling Co. Consolidated.

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COUNTERSTATEMENT OF CASE

Petitioner, a former employee of Coca-Cola Bottling Co. Consolidated (hereinafter "Consolidated"), filed a Complaint against Consolidated alleging various claims for race discrimination under federal law and North Carolina common law. The Complaint also alleged claims for retaliatory discharge and retaliatory hostile environment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. The Complaint alleged that Consolidated retaliated against Petitioner because she complained about an advertisement run by Consolidated in *The Charlotte Observer* and because she sent an e-mail to high ranking Consolidated officials complaining about the promotion of a co-worker.

On April 14, 1999, the district court granted Consolidated's motion for summary judgment on all of the claims in the Complaint and dismissed the action (Pet. Petition App. pp. 7a-32a). The district court dismissed the retaliatory discharge and retaliatory hostile environment claims on the grounds that Petitioner had not engaged in activity protected under Section 704(a) of Title VII (Pet. Petition App. pp. 27a-32a). Petitioner filed an appeal to the United States Court of Appeals for the Fourth Circuit. Petitioner appealed only the dismissal of the retaliatory discharge and retaliatory hostile environment claims.

On August 16, 2001 the Court of Appeals issued an unpublished per curiam opinion affirming the district court's order "substantially on the reasoning of the district court" (Pet. Petition App. pp. 2a-6a).

Petitioner did not request a rehearing by the Court of Appeals.

REASONS FOR DENYING THE WRIT

The sole question presented by the petition is whether the Court of Appeals' decision, adopting the district court's reasoning, "directly and plainly conflicts" with this Court's prior decision in *Reeves v. Sanderson Plumbing Co.*, 530 U.S. 133 (2000). The writ should be denied because: (a) to the extent Petitioner argues that the district court's decision conflicts with the "pretext" holding of *Reeves*, Petitioner failed to make this argument in the Court of Appeals and waived the argument; (b) the district court did not reach the issue of pretext in deciding the retaliation claims and the *Reeves* decision is not implicated by the decision; (c) the actual issues Petitioner presents in her petition do not warrant this Court's review; and (d) the district court did not err in concluding that Petitioner did not engage in activities protected by Title VII.

I. THE PETITIONER WAIVED ANY ARGUMENT REGARDING PRETEXT.[1]

The central holding of *Reeves v. Sanderson Plumbing Co., supra,* is that a plaintiff's proof of a prima facie case of discrimination, combined with sufficient evidence that the employer's asserted non-discriminatory reasons for its actions are false (or, a pretext), may permit a finding of unlawful discrimination. 530 U.S. at 144. In her brief filed with the Court of Appeals, Petitioner acknowledged that the district court did not consider the issue of pretext and she waived any argument regarding pretext by failing to address it in the Court of Appeals. In her brief, Petitioner stated:

> After the establishment of *prima facie* case, Appellee can rebut the inference of discrimination

1. The Court of Appeals' decision erroneously states that oral argument was held in this case. It was not.

> by producing evidence of legitimate reasons for the Appellant's termination. *Karpel v. Inova Health Systems*, 134 F.3d 1222, 1227-28 (4th Cir. 1998). If successful, the Appellant must prove that Appellee's offered reasons were mere pretext, and that the Company was instead unlawfully motivated by Appellant's protected activity. *Id.* Because the District Court incorrectly ruled no *prima facie* case existed, we do not reach the rebuttal and pretext issues in this appeal.

(Brief of Appellant, p.18 n.1.)

Since Petitioner waived her argument regarding pretext, and the Court of Appeals did not consider the issue, that issue is not properly before this Court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but not in the court of appeals is not properly before us).

II. BECAUSE THE *REEVES* PRETEXT STANDARD IS ONLY IMPLICATED ONCE A PLAINTIFF ESTABLISHES A PRIMA FACIE CASE, WHICH PETITIONER DID NOT DO HERE, THE FOURTH CIRCUIT'S DECISION AFFIRMING THE TRIAL COURT'S DECISION DID NOT INVOLVE A *REEVES* ANALYSIS AND THEREFORE DID NOT CONFLICT WITH THIS COURT'S PRECEDENT.

In deciding the retaliation claims, the district court never reached the stage of addressing whether defendant's reason for termination was a pretext for unlawful discrimination and never used either a pretext or pretext-plus standard. Rather, it concluded that Petitioner could not establish a prima facie

case of retaliation under Title VII. Further, although the district court's opinion cannot be construed to involve a *Reeves* analysis, the Fourth Circuit's short decision affirming it does not suggest that it used a standard contrary to Reeves, merely that it reached the same conclusion.

Petitioner's reliance on *Reeves* is a transparent attempt to force this case into a category of decisions typically considered for review by this Court where in fact there is nothing compelling such review. The trial court granted summary judgment on Petitioner's retaliatory discharge claim on the sole basis that Petitioner failed to establish a prima facie case of retaliation under Title VII. Specifically, the court concluded that Petitioner had not engaged in protected activity, an essential element of a Title VII retaliation prima facie case.

It is only after a plaintiff establishes a prima facie case that the burden shifts to a defendant employer to produce a legitimate non-discriminatory reason for the adverse employment action. It is at this point in the proof scheme, after a plaintiff establishes a prima facie case and the employer produces a legitimate reason for the adverse job action, that the *Reeves* decision becomes relevant. *Reeves* resolved a split among the circuits over whether a plaintiff's prima facie case of discrimination, combined with sufficient evidence for a reasonable fact finder to reject the employer's non-discriminatory reason for its decision, is sufficient to sustain a liability finding. The Court concluded that "plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." 530 U.S. at 148.

Petitioner's reliance on the *Reeves* decision is misplaced because the district court held that Petitioner did not establish a prima facie case. The trial court found:

> [N]o reasonable factfinder could conclude by reading Plaintiff's e-mail that she was protesting the Company's treatment of blacks, or its commitment to hiring minorities. As Plaintiff cannot establish that she engaged in opposition activity protected by Title VII, she fails to make a prima facie showing of retaliation and Defendant is entitled to judgment as a matter of law.

(Pet. Petition App. p. 31a).

Consequently, without a finding that Petitioner met her burden to show a prima facie case, the burden never shifted to defendant to produce a legitimate non-discriminatory reason for the discharge. Without that burden shift, the burden in turn never shifted back to Petitioner to raise an issue of fact as to whether the cited reason for her termination was pretext for unlawful discrimination. *Reeves* simply never entered the trial court's analysis of the retaliation claims.

Indeed, it is curious that Petitioner now asserts that the decision conflicts with *Reeves* when she acknowledged in her brief to the Fourth Circuit that the district court never reached the issue of pretext. As discussed *supra*, Petitioner stated in her brief to the Fourth Circuit that "[b]ecause the District Court incorrectly ruled no *prima facie* case existed, we do not reach the rebuttal and pretext issues in this appeal." (Brief of Appellant, p. 18 n.1). Petitioner's assertion that the trial court's decision conflicts with *Reeves* thus does not withstand scrutiny, and the writ should be denied.

III. THE PETITION DOES NOT RAISE A SUBSTANTIAL QUESTION WORTHY OF THIS COURT'S REVIEW.

The Petition in this matter amounts to nothing more than a request for this Court to conduct another de novo review of the

district court's judgment. The Petition does not present the type of question that warrants review by the United States Supreme Court.

This Court rightfully exercises its discretion to review the matters brought before it only for compelling reasons. Rule 10 of the Rules of the Supreme Court of the United States provides guidance regarding the types of questions that might warrant the granting of a writ of certiorari. Here, Petitioner attempts to invoke the grounds provided for in Rule 10(c) by claiming that the Court of Appeals' decision conflicts with existing Supreme Court precedent. (Pet. Petition p. 9 n.3). As argued above, the Court of Appeals' decision neither conflicts with *Reeves* nor implicates its holding in any way. Rather, Petitioner seeks simply another review of the district court's decision granting summary judgment. By way of example, Petitioner make the following assertions summarizing the types of issues on which she seeks review:

> The lower court erred in not finding that Petitioner established a *prima facie* case of retaliatory discharge and harassment, by refusing to draw all reasonable inferences in favor of Petitioner and consider the totality of the events giving rise to her reasonable belief that she was being subjected to a racially hostile work environment.
>
> . . . .
>
> Given that the trial court erred both in finding that Petitioner did not engage in protected activity and in crediting the Company's nondiscriminatory reason, it becomes apparent that summary judgment was improperly granted.

(Pet. Petition pp. 15, 17).

These statements show the true nature of the questions Petitioner raises.

Other arguments raised by the Petitioner are of a similar nature. Petitioner asserts that the district court "applied an incorrect formulation of . . . the summary judgment standard in general" (Pet. Petition p. 12). This is not correct. The district court properly stated the summary judgment standard in its decision (Pet. Petition App. p. 20a). Petitioner's real argument is that the district court engaged in fact finding and failed to view the facts in the light most favorable to her (Pet. Petition p. 13). This was the thrust of her argument to the Court of Appeals. Her attempt to rehash that argument should not prompt this Court's review.

Petitioner also argues that the district court erred "by accepting the Defendant's asserted non-discriminatory reasons as true when there was evidence to the contrary." (Pet. Petition, p. 13). This argument is patently false and misleading. The district court dismissed the retaliation claims solely on the grounds that Petitioner did not engage in activity protected by Title VII and failed to establish a prima facie case (Pet. Petition App. pp. 29a-31a). The court did not reach nor consider the issue of Consolidated's non-retaliatory reasons for its actions (Pet. Petition App. pp. 29a-31a).

Rule 10 counsels that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." These are precisely the types of errors upon which Petitioner seeks review. The Petition does not raise a substantial question that warrants this Court's review and the writ should be denied.

IV. THE COURT OF APPEALS PROPERLY HELD THAT PETITIONER DID NOT ENGAGE IN PROTECTED ACTIVITY.

The Court of Appeals, adopting the district court's reasoning, concluded that Petitioner did not engage in protected activity and, accordingly, could not establish a prima facie case of retaliation. The court held that Petitioner's concern regarding wording of the newspaper advertisement was not opposition to a practice made unlawful by Title VII. The district court also held that Petitioner's electronic correspondence to Company officials was not opposition to a practice made unlawful by Title VII. Although not framed as the "Question Presented" to this Court, Petitioner asserts that these holdings are erroneous.

Section 704(a) of Title VII provides as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . , because he has opposed any practice made an unlawful employment practice by this subchapter, or because he had made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

"Participation" activities differ from "opposition" activities and opposition activities are afforded a lesser degree of protection. *Laughlin v. Metropolitan Washington Airport Auth.*, 149 F.3d 253, 259 n.4 (4th Cir. 1998).

In order to be protected as opposition activity, an employee's conduct must "oppose[] [a] practice made an

unlawful employment practice by this Title VII," 42 U.S.C. § 2000e-3(a); *see Jamil v. Secretary, Dep't of Defense*, 910 F.2d 1203, 1207 (4th Cir. 1990) (to be protected, opposition must be " 'to conduct or practices violative of Title VII' ") (quoting *Theard v. United States Army*, 653 F. Supp. 536, 545 (M.D.N.C. 1987)).

Petitioner's electronic correspondence expressing her outrage at Steve Hewitt's promotion was not opposition to a practice made unlawful by Title VII. Petitioner's complaint was not that Consolidated's decision to promote Hewitt was discriminatory or unlawful. For example, she did not oppose Hewitt's promotion because Consolidated selected Hewitt for the position over an equally or better qualified minority candidate. Rather, Petitioner believed that the promotion was a poor business decision and that it was unfair to promote Hewitt in light of his past behavior towards her (Pet. Petition App. p. 30a). It simply is not unlawful under Title VII to make a poor or ill-advised promotion decision. Objectively, Consolidated's promotion of Hewitt was not unlawful and could not reasonably have been viewed as unlawful.

The Court of Appeals also properly held that Petitioner's expressed concerns about the newspaper advertisement were not protected opposition activity because the advertisement was not unlawful or discriminatory, and Petitioner could not objectively have believed it was unlawful. Petitioner did not complain that the advertisement was unlawful or discriminatory. She merely expressed concern that some African-Americans could find the parenthetical definitions in the advertisement demeaning.

Petitioner also contends that the district court "failed to note, let alone consider," evidence of other protected activity in which Petitioner allegedly engaged (Pet. Petition

pp. 13-14). Again, this is incorrect. The district court noted in its decision Petitioner's other so-called opposition activity (Pet. Petition App. 15a-17a).

The Court of Appeals correctly decided that Petitioner failed to engage in activity protected by Title VII, and that decision does not warrant review by this Court.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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